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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

J THOMPSON and WILLIAM P.  
DUNCANSON, Individually and on  
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

1-800 CONTACTS, INC., VISION  
DIRECT, INC. and DOES 1-15,

Defendants.

Case No. '16CV2552 LAB KSC

CLASS ACTION

COMPLAINT FOR VIOLATIONS OF  
THE SHERMAN ANTITRUST ACT  
AND CALIFORNIA'S  
CARTWRIGHT ACT AND UNFAIR  
COMPETITION LAW

DEMAND FOR JURY TRIAL

1 Plaintiffs J Thompson and William P. Duncanson (“plaintiffs”) hereby bring  
2 this action for damages and other relief against defendants 1-800 Contacts, Inc. (“1-  
3 800 Contacts” or the “Company”), Vision Direct, Inc. (“VisionDirect”) and Does 1-15  
4 (collectively “defendants”) for violations of the Sherman Antitrust Act (15 U.S.C.  
5 §§1-3), and California’s Cartwright Act (California Business & Professions Code  
6 §16700, *et seq.*) and Unfair Competition Law (“UCL”) (Cal. Bus. & Prof. Code  
7 §17200, *et seq.*). Plaintiffs make all allegations upon information and belief except as  
8 to those paragraphs that are based on plaintiffs’ personal knowledge.

### 9 **THE CONSPIRACY**

10 1. Plaintiffs bring this action on behalf of all direct-to-consumer purchasers  
11 of contact lenses, including those who purchased contact lenses online, in the United  
12 States and a subclass of all California residents against defendant 1-800 Contacts as  
13 the ringleader behind a scheme to prevent competition in the online market for contact  
14 lenses and against 1-800 Contacts’ currently unnamed co-conspirators, Does 1-15.  
15 This action arises out of defendants’ overarching scheme to restrain competition in the  
16 direct-to-consumer and online markets for contact lenses.

17 2. As recently revealed in a complaint by the Federal Trade Commission  
18 (“FTC”), 1-800 Contacts is the instigator and enforcer of an unlawful series of  
19 agreements between 1-800 Contacts and at least 14 of its “competitors” to divide up  
20 the direct-to-consumer and online markets for sales of contact lenses. These 15  
21 “competitors” combine to control over 50% of the direct-to-consumer and online  
22 markets for contact lenses. 1-800 Contacts accounts for over 50% of the online  
23 market by itself. In particular, 1-800 Contacts abused its monopoly power and entered  
24 into bilateral agreements with each of its competitors/co-conspirators to not bid  
25 against each other in advertising auctions conducted by internet search engines.

26 3. Due to the massive amount of information available on the internet,  
27 internet search engines have become indispensable to anyone seeking to use the  
28 internet. Internet search engines are generally simple to use – a user need only enter

1 keywords, such as “contact lenses,” into a field and the search engine will use an  
2 algorithm to find and list the webpages that are responsive to the query, usually  
3 ranked in order of relevance. Search engines, such as Google or Bing, are usually free  
4 to users. The main source of revenue for these search engines is the advertising they  
5 sell, which appears in response to a user’s search and is displayed adjacent to the  
6 respective search engine’s organic results. This form of advertising has a proven track  
7 record of being successful, as it allows the advertisers to market directly to consumers  
8 at the very moment they are looking to make a purchase or have expressed an interest  
9 in a specific subject. Online search engine advertising is critical to nearly every  
10 company’s ability to compete in the digital age. Google and Bing sell this advertising  
11 through automated auctions.

12       4.     A successful way for competitors to raise awareness of their products and  
13 compete for sales is to purchase search advertising that mentions their competitors,  
14 especially as a comparison. For example, if a consumer is looking to buy a television  
15 for the cheapest price and knows a big retailer like Best Buy sells televisions, the  
16 consumer might search for “cheaper than best buy for tvs.” Such a search will likely  
17 yield sponsored ads by Best Buy, but also ads by competitors, such as Walmart.

18       5.     This is not the case in the contact lenses industry. A search of “cheaper  
19 than 1-800 contacts for contact lenses” yields sponsored advertising by only one  
20 company, 1-800 Contacts. The reason for this disparity is that anticompetitive  
21 bilateral agreements between 1-800 Contacts and its co-conspirators prevent each  
22 other from bidding on any search keywords or phrases with the other company’s  
23 brand names, websites or trademarks in them. In addition, the agreements require that  
24 1-800 Contacts and its co-conspirators use “negative keywords.” This is an  
25 instruction to the search provider that a company’s advertisement *should not* appear in  
26 response to a search query that contains a particular term or terms. Normally negative  
27 keywords are used to prevent advertising appearing from irrelevant queries that may  
28 contain similar words. For example, a company that sells billiards accessories would

1 bid for the term “pool” in order to advertise for pool sticks, but use a negative  
2 keyword of “swimming” to prevent its ads from appearing when someone is looking  
3 for water-related accessories. While many companies use negative keywords to  
4 properly tailor advertisements to interested consumers, defendants use negative  
5 keywords to allocate the market for contact lenses. 1-800 Contacts and its co-  
6 conspirators agreed to instruct search advertisers that their advertising should not  
7 appear when a search includes a competitor’s trademark through the use of negative  
8 keywords.

9         6. The 1-800 Contacts-led scheme has been ongoing for more than a  
10 decade. In 2003, there was an estimated \$200 million worth of online contact lens  
11 sales. Though 1-800 Contacts accounted for \$187 million worth of those sales, the  
12 Company realized that it was beginning to have real competition for direct sales. 1-  
13 800 Contacts thereafter devised a plan to unlawfully stifle online competitors so that it  
14 could continue to sell contact lenses at higher prices than its rivals without losing  
15 market share. Specifically, in order to restrict competition and maintain its market  
16 share and pricing, 1-800 Contacts began accusing its then competitors of trademark  
17 infringement if a rival’s advertisement appeared on the search results page in response  
18 to internet search queries that involved 1-800 Contacts’ brand name, websites or  
19 trademarks. 1-800 Contacts’ position was legally baseless and a transparent threat to  
20 inundate its competitors with prolonged and costly litigation.

21         7. Between 2004 and 2013, fourteen of 1-800 Contacts’ competitors agreed  
22 with 1-800 Contacts not to bid against 1-800 Contacts in certain auctions in order to  
23 settle the sham lawsuits or threat thereof. Most of the competitors agreed to 1-800  
24 Contacts’ terms before even asserting counter claims. The agreements – ***which are***  
25 ***reciprocal*** – prevented 1-800 Contacts and its competitors from bidding in search  
26 advertising auctions for any of the others’ trademarked terms and common variations,  
27 including common misspellings, of any of those terms. Each competitor knew that by  
28 entering into this agreement, its market share and profits would be protected. Of

1 course, to ensure this was the case, all a competitor needed to do was a Google search.  
2 In addition, 13 of the agreements called for the adoption of negative keywords. Only  
3 one competitor, Lens.com, refused to enter into an agreement. 1-800 Contacts and  
4 Lens.com proceeded to litigate 1-800 Contacts' bogus trademark claim, and after  
5 years of litigation, Lens.com prevailed. The district court in that action specifically  
6 called the practice of seeking agreements that preclude a competitor's advertisements  
7 from appearing on a search results page any time its mark is entered as a search term  
8 "an anti-competitive, monopolistic protection to which [1-800 Contacts] is not  
9 entitled."<sup>1</sup> Notably, in its answer to the FTC action, 1-800 Contacts admitted that it  
10 entered into these agreements with competitors in all but one case to allegedly resolve  
11 threatened or actual trademark litigation.

12 8. Members of the Class and the California Subclass (as defined herein)  
13 were injured by defendants' actions. First, the members of the Class and California  
14 Subclass paid supracompetitive prices for contact lenses. Indeed, the impetus for 1-  
15 800 Contacts' scheme was to suppress competition to protect the margins the  
16 Company traditionally enjoyed before competition entered the marketplace.

17 9. In addition, defendants' actions prevented the Class and California  
18 Subclass from receiving the benefits of a fair and competitive marketplace for both  
19 information and pricing of contact lenses sold directly to consumers, including online.  
20 Because of the unlawful agreements, competitors could not advertise against 1-800  
21 Contacts, and therefore customers did not receive information concerning  
22 competitors' products and pricing. Because of these agreements, 1-800 Contacts  
23 continued to give the impression that it was a low-cost provider of contact lenses,  
24 shielding the public from information that would have driven the price of contact  
25 lenses down.

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27 <sup>1</sup> *1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 1151, 1174 (D. Utah 2010),  
28 *aff'd in part and rev'd in part on other grounds*, 722 F.3d 1229 (10th Cir. 2013).







20. During the Class Period, plaintiff William P. Duncanson (“Duncanson”) purchased contact lenses directly from 1-800 Contacts through its website. Plaintiff Duncanson purchased these lenses at supracompetitive prices, and was injured thereby. Plaintiff Duncanson is a resident of San Francisco, California.

21. Defendant 1-800 Contacts is a corporation organized, existing, and doing business under and by virtue of the laws of the United States, with its principal place of business located at 261 West Data Drive, Draper, Utah 84020. 1-800 Contacts sells contact lenses and related products over the internet and by telephone throughout the United States, including to California residents.

22. Defendant VisionDirect is a leading online retailer of contact lenses and vision care supplies. The Bellevue, Washington-based company offers a full line of bestselling products like Acuvue®, Bausch & Lomb®, CIBA Vision®, and CooperVision®, plus specialty brands and lenses. VisionDirect was founded in 2000 and has since shipped over 8 million orders. In 2003, VisionDirect was acquired by drugstore.com®, and in 2011, it became part of the Walgreens group of companies.

23. The true names and capacities of defendants sued herein as Does 1 through 15, inclusive (“Doe Defendants”), are presently not known to plaintiffs, who therefore sue these defendants by such fictitious names. Plaintiffs will seek to amend this complaint and include these Doe Defendants’ true names and capacities when they are ascertained. Each of the fictitiously named defendants is responsible in some manner for the conduct alleged herein and for the injuries suffered by the Class and California Subclass.

## THE MARKET FOR CONTACT LENSES

### The Relevant Markets

24. Plaintiffs first plead a relevant market for antitrust purposes as the market for direct-to-consumer sales of contact lenses. This includes both online and telephone sales of contact lenses to consumers (“direct-to-consumer”). Because of the ease of purchasing contacts without going to a physical store, the traditional retail



1 market for contacts exists separately, and is not a substitute for online and telephone  
2 sales. A small but significant increase in the price for online contacts would not drive  
3 consumers to purchase contacts in a retail store. Alternatively, the relevant market for  
4 antitrust purposes is only online sales. Discovery and expert testimony may reveal  
5 that online sales and telephone sales are not close economic substitutes. As detailed  
6 below, the traditional retail sale of contact lenses exists in a different market. The  
7 relevant geographic market is the United States. Regardless of whether the market is  
8 defined as direct-to-consumer or online sales only, 1-800 Contacts has a significant  
9 enough market share to exert market power.

10 25. A contact lens is a lightweight, corrective, cosmetic or therapeutic device  
11 that is usually placed directly onto the cornea of the eye. Contact lenses have many  
12 benefits for wearers, including appearance and practicality.

13 26. Contact lenses are considered medical devices by the United States Food  
14 and Drug Administration (the “FDA”). Accordingly, the FDA regulates the  
15 manufacture, distribution and sale of contact lenses in the United States.

16 27. In addition, in 2003, Congress enacted the Fairness to Contact Lens  
17 Consumers Act, 15 U.S.C. §§7601-7610. Pursuant to this act, the FTC promulgated  
18 rules concerning the sale of contact lenses with the intention of increasing competition  
19 for the sale of contact lenses (the “Contact Lens Rule”). The Contact Lens Rule  
20 places certain restrictions on how contact lenses can be sold. Most notably, the  
21 Contact Lens Rule requires sellers to only sell to customers who have a valid  
22 prescription and can confirm the accuracy of the prescription.

23 28. The U.S. Centers for Disease Control and Prevention estimates that there  
24 are approximately 40.9 million contact lens wearers in the United States aged eighteen  
25 years and older, or approximately 16.7% of the adult population.

26 29. The markets for direct-to-consumer and online sales of contact lenses are  
27 distinct from the traditional brick and mortar market. Direct-to-consumer contact lens  
28 sellers are able to sell contact lenses anywhere in the United States that receives mail.

1 Online contact lens sellers provide the consumer the convenience of being able to  
2 order contacts from any location without having to find a brick and mortar store  
3 selling their needed type of contact lenses. According to data from Bain Capital  
4 regarding the future of independent optometry, in 2012 an estimated 20% of contact  
5 lens sales occurred online. That number has since increased.

6 30. In contrast to direct-to-consumer sales of contacts, retailers in the  
7 traditional market operate from physical storefronts or professional offices, maintain  
8 an eye-care professional on-site to examine and fit their customers, and issue contact  
9 lens prescriptions. Traditional retailers do not set their prices based upon direct-to-  
10 consumer prices. According to an economist with the FTC who examined online and  
11 offline prices for contact lenses, “[O]ffline firms set prices on the assumption that  
12 most of their customers are unaware of online prices.” See James C. Cooper, *Prices*  
13 *and Price Dispersion in Online and Offline Markets for Contact Lenses*, FTC Bureau  
14 of Economics Working Paper (Nov. 29, 2006).

15 **The Demand for Contact Lenses Is Inelastic**

16 31. “Elasticity” is a term used to describe the sensitivity of supply and  
17 demand to changes in one or the other. For example, demand is said to be “elastic” if  
18 an increase in the price of a product results in diminished revenues, with declines in  
19 the quantity sold of that product outweighing the effects of higher prices. For  
20 products with a highly elastic demand, customers have many feasible alternatives for  
21 cheaper products of similar quality and decrease purchases sharply in the face of even  
22 a small price increase. Here, the demand for contact lenses is inelastic.

23 32. Markets with lower elasticity facilitate collusion, allowing producers to  
24 raise their prices without triggering customer substitution and sufficient lost sales  
25 revenues as to offset the beneficial effect of higher prices on profits for products they  
26 still continue to sell.

27 33. There is only one other medical device that provides some of the same  
28 benefits as contact lenses – eyeglasses. Many people choose to wear contact lenses as

1 opposed to eyeglasses because they do not steam up, they provide a wider field of  
2 vision, and they are more suitable for a number of sporting activities. In addition,  
3 some people find wearing contact lenses more aesthetically pleasing than eyeglasses.  
4 Contact lenses also have the ability to alter the color of a user's eye and can be used  
5 solely for cosmetic purposes. Contact lens manufacturers, distributors, online sellers,  
6 brick and mortar retailers and consumers do not compare the price of contact lenses to  
7 those of glasses.

8 34. Contact lenses have a limited lifespan, and therefore a contact lens user  
9 will have to periodically purchase more contact lenses. Contact lens users will  
10 purchase contact lenses that are good for a set amount of time and buy a certain supply  
11 of the contact lens. Usually, the contact lens users' eye-care providers will decide the  
12 type of contact used, the strength of the contact, and whether a contact lens has to be  
13 replaced daily, weekly or monthly. Therefore, consumers exert little choice in the  
14 particular type of contact lens they will buy. As a result, contact lens purchasers will  
15 continue to use and acquire contact lenses even if there is an increase in price.

16 **The Markets for Direct-to-Consumer and Online**  
17 **Contact Lens Sales Are Highly Concentrated**

18 35. 1-800 Contacts has dominated the market for direct-to-consumer sales of  
19 contact lenses since it was founded in 1995.

20 36. In 1999, orders of contact lenses in the direct-to-consumer market, as  
21 opposed to the brick-and-mortar or traditional market, began to shift from over-the-  
22 phone sales to sales through online channels.

23 37. Since then, sales of contact lenses through the internet have increased due  
24 to the ease and convenience of ordering contacts online, among other factors. For  
25 instance, a contact lens user can order new contact lenses online, even if they have  
26 recently moved and have yet to find a new eye-care provider. Indeed, this is the exact  
27 scenario that happened to plaintiff Thompson, which led to his first purchases from 1-  
28 800 Contacts.

1        38. 1-800 Contacts is by far the most dominant company in direct-to-  
2 consumer and online contact lens sales, accounting for between 50%-55% of the  
3 market since 2005. Collectively, 1-800 Contacts and the fourteen companies that it  
4 entered into the illegal bilateral agreements with account for over 80% of the market  
5 for online contact lens sales.

6                    **ANTICOMPETITIVE CONDUCT BY THE DEFENDANTS**

7        39. Defendants are horizontal competitors.

8        40. The conspiracy consisted of a continuing agreement, understanding or  
9 concerted action between and among defendants and their co-conspirators in  
10 furtherance of which defendants fixed, maintained or made artificial prices for contact  
11 lenses sold directly to consumers, including online, in the United States and to  
12 California residents by rigging search engine advertising auctions and preventing the  
13 dissemination of information to the Class and California Subclass during the Class  
14 Period. Defendants' conspiracy constitutes a *per se* violation of the Sherman Antitrust  
15 Act and the Cartwright Act and is an unreasonable and unlawful restraint of trade and  
16 an unlawful, unfair or fraudulent practice under the UCL.

17        41. At all relevant times, other corporations, individuals and entities willingly  
18 conspired with defendants in their unlawful and illegal conduct. Numerous individuals  
19 and entities participated actively during the course and in furtherance of the scheme  
20 described herein. The individuals and entities acted in concert by joint ventures and by  
21 acting as agents for principals in order to advance the objectives of the scheme to  
22 benefit defendants and themselves through the manipulation of contact lens prices in  
23 the United States and sold to California residents.

24                    **Online Advertising and Sale of Contact Lenses**

25        42. Contact lens retailers such as 1-800 Contacts rely heavily on internet  
26 advertising to attract and inform consumers about their products and to direct  
27 consumers to their websites and phone representatives. The vast majority of this  
28 advertising is done through internet search engines such as Google and Yahoo!.

1 Internet search engines are computer programs that allow web users to search the  
2 World Wide Web for websites containing particular content. When a search term is  
3 entered, the search engine compares the term against its databases and applies a  
4 formula or algorithm to produce a search engine results page that lists the websites  
5 that may relate to the user's search terms. Google's search engine, for example, has a  
6 natural or organic system that lists results with the most relevant websites appearing  
7 near the top of the page. In addition, search results pages list paid advertisements  
8 above or to the right of the organic search results. These paid advertisements are  
9 referred to as "sponsored links." Consumers depend on search engines to navigate the  
10 nearly unlimited amount of content on the internet.

11 43. Search engine companies sell advertising space on search engine results  
12 pages by way of auction. Advertisers bid on certain words or phrases known as  
13 "keywords." When a user's search term matches an advertiser's keyword, a  
14 sponsored link appears for that advertiser. The order and location of the sponsored  
15 link depends on the amount bid for the keyword and the quality of the advertisement.  
16 According to the terms and conditions of the search engine companies, advertisers  
17 cannot pay to be listed in a specific order on the search engine results page, they can  
18 only pay for advertisements.

19 44. When bidding on a keyword, an advertiser may specify whether  
20 keywords should be applied as a "broad match," "phrase match," "exact match," or  
21 "negative match." When an advertiser designates a keyword as a "broad match," its  
22 sponsored link will appear anytime a search is conducted for that keyword, its plural  
23 forms, its synonyms, or phrases similar to the word. When an advertiser designates a  
24 keyword as a "phrase match," its sponsored link will appear when a user searches for  
25 a particular phrase, even if the user includes other terms before or after the phrase.  
26 When an advertiser designates a keyword as an "exact match," then its sponsored link  
27 will appear only when the exact phrase bid on is searched on Google. In contrast,  
28 when an advertiser designates a keyword as a "negative match," the advertiser ensures

1 that its link will not appear when certain terms are searched. For example, a contact  
2 lens seller may specify that its link should not appear when the phrase “contact lists”  
3 is entered.

4 45. Defendants pay for advertisements on a “cost-per-click” basis. This  
5 means if a keyword generates a sponsored link, but the internet user does not click on  
6 that link, the advertiser does not pay for its link appearing on the search results page.  
7 The appearance of an advertiser’s link on a user’s computer is called an “impression.”  
8 An advertiser selects the language used in its advertisements. The language can be  
9 important in capturing a user’s attention so the user will click on the link to an  
10 advertiser’s website. An advertiser can gauge the success of an impression (and the  
11 search terms that led to that impression) by calculating how many impressions occur  
12 in comparison to the number of clicks.

13 46. Search advertising is crucial to advertisers because it allows them to  
14 deliver a message to the consumer exactly when the consumer is expressing interest in  
15 a specific subject and potentially at the same time the consumer is ready to make a  
16 purchase. In the online contact lens market, consumers rarely have preference over  
17 which particular retailer they make their purchase from. Instead, consumers most  
18 frequently use generic search terms such as contact, contact lens and replaceable lens,  
19 and purchase based on the lowest price available for their prescription.

20 **1-800 Contacts’ Scheme to Restrain Competition**  
21 **and Maintain Its Dominant Market Position**

22 47. 1-800 Contacts was founded in February 1995 as 1-800-LENSNOW, but  
23 changed its name to 1-800 Contacts in July 1995. Within one month of changing its  
24 name, 1-800 Contacts received 2,000 calls and produced \$38,000 in revenue. 1-800  
25 Contacts’ business grew rapidly over the next few years, as it became the most  
26 dominant company in direct-to-consumer contact lens sales, including online sales.

27 48. By the early 2000s, however, competitors began to enter the direct-to-  
28 consumer market for the sale of contact lenses. These competitors, like VisionDirect,

1 heavily invested in online search advertising and undercut 1-800 Contacts' prices.  
2 Through lower prices, these competitors quickly grew their sales and became a serious  
3 threat to 1-800 Contacts' dominant market position.

4 49. This sparked concern at 1-800 Contacts. In 2005, as Americans' comfort  
5 with the internet and online shopping increased, in an effort to deter its competitors  
6 and reduce competition, 1-800 Contacts implemented a business practice whereby it  
7 conducted periodic online searches of "1-800 Contacts" and variations thereof on  
8 internet search engines. Anytime its searches returned the sponsored link of a  
9 competitor, 1-800 Contacts would send a cease-and-desist letter to the competitor that  
10 accused the competitor of infringing upon its trademark by purchasing a keyword  
11 using 1-800 Contacts' name from the internet search engine. But this claim was  
12 incorrect.

13 50. 1-800 Contacts understood that it had no legal basis for these accusations.  
14 1-800 Contacts knew that an internet search for "1-800 Contacts" would return a list  
15 of links from various retailers that had acquired generic, non-infringing search terms  
16 such as "contact" and "contact lens."

17 51. Before sending the cease-and-desist letters, 1-800 Contacts did not  
18 confirm that its competitors had purchased "1-800 Contacts" as a keyword. With  
19 respect to at least one competitor, Lens.com, 1-800 Contacts did not run any privacy  
20 reports to determine the keywords that had generated search results containing the  
21 links for the rival's website. Rather, it simply presumed that Lens.com had purchased  
22 "1-800 Contacts" as a keyword.<sup>2</sup>

23 52. Indeed, in response to litigation threats, several competitors of 1-800  
24 Contacts advised 1-800 Contacts that: (i) they had never used 1-800 Contacts'  
25 trademark in their advertisements, and/or (ii) the use of generic keywords would

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26  
27 <sup>2</sup> Whether or not it is legal to use a competitor's trade name as a search term (it  
28 likely is) is irrelevant. The intent of the threatened legal action was to monopolize the  
industry and to get 1-800 Contacts' competitors to agree to divvy up the market.



1 sometimes result in a search triggering a multitude of other contact lens sites,  
2 including legitimate sponsored advertisements. Through its counsel, one competitor,  
3 Memorial Eye, specifically advised 1-800 Contacts that it had ““never used, or even  
4 considered using, [1-800 Contacts’] trademark in its sponsored advertisements, or  
5 even a search phase trigger.”” 1-800 Contacts nevertheless continued with its threats,  
6 hoping to protect its market share and extract an anticompetitive agreement from its  
7 competitors by forcing them to incur substantial cost and/or limit the keywords they  
8 purchased from search engines.

9       53. Competitors who refused to bow to 1-800 Contacts’ demands concerning  
10 a limitation on keywords or use of negative keywords were threatened with litigation.  
11 Most of these rivals lacked the size and resources to withstand substantial litigation.  
12 Between 2004 and 2013, 1-800 Contacts was able to extract at least 14 horizontal  
13 agreements that restrained trade and reduced output in the relevant markets.

14       54. All of the agreements prohibit 1-800 Contacts’ competitors from bidding  
15 in a search advertising auction for 1-800 Contacts’ trademarked terms, as well as  
16 variations thereof. All of the agreements are reciprocal, meaning that 1-800 Contacts  
17 is likewise prohibited from bidding in a search advertising auction for its competitors’  
18 trademarked terms, as well as variations thereof. This part of the agreement is market  
19 allocation, a naked horizontal restraint on trade and *per se* illegal under the Sherman  
20 Antitrust Act. Additionally, 13 of the agreements require 1-800 Contacts’ competitors  
21 to use “negative keywords,” which direct a search engine not to display the  
22 competitor’s advertisement in response to a search query that includes 1-800  
23 Contacts’ trademarked names or variations thereof.

24       55. One such competitor who entered into an agreement with 1-800 Contacts  
25 is VisionDirect. VisionDirect sold contact lenses online at [www.visiondirect.com](http://www.visiondirect.com). It  
26 entered into two horizontal agreements with 1-800 Contacts.

27       (a) The first agreement was entered into on June 24, 2005 (the “2005  
28 Agreement”). Under the 2005 Agreement, VisionDirect was prohibited from

1 ““causing [its] website or Internet advertisement to appear in response to any Internet  
 2 search for [1-800 Contacts’] brand name, trademark or URL.”” The agreement also  
 3 prohibited VisionDirect from ““causing [its] brand name, or link to [its] Websites to  
 4 appear as a listing in the search results page of an Internet search engine, when the  
 5 user specifically searches for [1-800 Contacts’] brand name, trademark or URLs.””  
 6 On information and belief, VisionDirect, through its counsel, Wilson Sonsini  
 7 Goodrich & Rosati, expressed serious antitrust concerns about the enforceability of  
 8 the 2005 Agreement as it related to the implementation of negative keywords. On  
 9 January 24, 2008, Wilson Sonsini wrote 1-800 Contacts’ General Counsel:

10 Separate and apart from Vision Direct’s position regarding the interpretation of the  
 11 contract, set forth in Ms. Caditz’s November 5, 2007 letter—that is, that the Agreement does not  
 12 contemplate the implementation of negative key words—Vision Direct continues to believe that  
 13 any agreement between the parties with regard to the implementation of negative key words  
 14 creates an unacceptable risk of violating Section 1 of the Sherman Act, and as such, represents a  
 15 serious antitrust issue. Any such agreement would appear to represent a restraint unrelated to the  
 16 terms of the Agreement and unrelated to a valid intellectual property right, and one that  
 17 depresses the price of key words to search companies such as Google, Yahoo! and Microsoft.

18 (b) The second agreement was entered into in 2009 (the “2009  
 19 Agreement”). Under the 2009 Agreement, 1-800 Contacts and VisionDirect agreed to  
 20 implement negative keyword lists in connection with their internet advertising efforts.  
 21 There, too, VisionDirect expressed concern about the antitrust law problems  
 22 associated with 1-800 Contacts’ agreement. VisionDirect expressed its concerns in the  
 23 2009 Agreement, which provided:

#### 24 RECITALS

25 WHEREAS, the Dispute arises out of the allegations that Vision Direct’s Internet advertisement appeared in the search  
 26 results pages of one or more Internet search engines when a user searched for 1-800 Contacts.

27 WHEREAS, 1-800 Contacts claims that the appearance of such Internet advertisements violates the 2004 Settlement  
 28 Agreement, and infringes 1-800 Contacts’ trademarks;

29 WHEREAS, Vision Direct and Drugstore.com have raised a concern that an agreement with a competitor to implement  
 30 negative keywords could implicate the antitrust laws of the United States, and 1-800 Contacts has taken the position that no  
 31 antitrust laws would be violated by such an agreement;

32 56. This action by VisionDirect was against its economic interests. In a  
 33 competitive marketplace, VisionDirect would have continued to compete, in both

1 advertising and on price. It could have covered its prices and increased its market  
2 share, taking from 1-800 Contacts. Instead, it agreed not to compete. This rationale  
3 applies to the remainder of the Doe Defendants. No Doe Defendant was acting in its  
4 best economic interest, unless there was a conspiracy.

5 57. Importantly, VisionDirect and the remainder of the Doe Defendants must  
6 have known that the other defendants were coming to the same agreement with 1-800  
7 Contacts. This tacit agreement, in light of the other allegations in the complaint,  
8 including the continued market share of 1-800 Contacts, are enough to establish §1  
9 liability through a hub-and-spoke conspiracy with 1-800 Contacts at the center. On  
10 information and belief, 1-800 Contacts assured VisionDirect and the other Doe  
11 Defendants that it was entering into agreements with all the participants in the direct-  
12 to-consumer contact lens market. This would ensure that each market participant was  
13 guaranteed to maintain its market share and, with no competing search results coming  
14 up when each company's name was searched for, would enable VisionDirect and the  
15 co-conspirators to charge supracompetitive prices.

16 58. Another factor making this conspiracy successful was how easy it was to  
17 ensure that no competitor was cheating on the conspiracy and violating the terms of  
18 their agreement. All it would take to ensure that a competitor was abiding by the  
19 conspiracy was a simple internet search.

20 59. 1-800 Contacts also sought to force many of its other competitors to  
21 implement measures similar to those agreed to by VisionDirect,<sup>3</sup> including the  
22 following:

23 (a) JSJ Enterprises: JSJ sold replacement contact lenses to consumers  
24 at [www.contactlensconnection.com](http://www.contactlensconnection.com).

25 (b) Premier Holdings: Premier Holdings sold replacement contact  
26 lenses to consumers at [www.ezcontactusa.com](http://www.ezcontactusa.com) and [www.filmart.com](http://www.filmart.com). After 1-800

27 \_\_\_\_\_  
28 <sup>3</sup> On information and believe, these likely co-conspirators are the Doe Defendants.

1 Contacts initiated litigation, 1-800 Contacts and Premier Holdings entered into a string  
2 of eight stipulations to extend the deadline to answer in order for the parties to  
3 continue settlement discussions.

4 (c) LensWorld: LensWorld sold replacement contact lenses to  
5 consumers at www.lensworld.com, www.contactmania.com and  
6 www.contactlensworld.com. After extensive settlement discussions, LensWorld  
7 ultimately allowed the court to enter an order, through a default motion, which  
8 required LensWorld to “implement the negative keywords attached hereto as Exhibit  
9 A in any search engine advertising campaign performed for the benefit of  
10 [LensWorld], where possible, for so long as any one of [1-800 Contacts’] federally  
11 registered trademarks remain active.” The list included 36 different search terms,  
12 including “www.contacts.com.”

13 (d) Lensfast: Lensfast sold replacement contact lenses to consumers at  
14 www.lensfast.com, www.contactlens.com and www.e-contacts.com. It also sold  
15 contacts over the telephone at 1-800 LENSFAST.

16 (e) Lenses for Less: Lenses for Less sold replacement contact lenses to  
17 consumers at www.lensesforless.com.

18 (f) Arlington Contact Lens Service: Arlington Contact Lens Service,  
19 which did business as Discount Contact Lenses, sold replacement contact lenses to  
20 consumers at www.discountcontactlenses.com and www.aclens.com.

21 (g) Empire Vision Center: Empire Vision Center sold replacement  
22 contact lenses to consumers at www.lens123.com.

23 (h) Contact Lens King: Contact Lens King sold replacement contact  
24 lenses to consumers at www.contactlensking.com.

25 (i) Tram Data: Tram Data LLC sold replacement contact lenses to  
26 consumers at www.replacemycontacts.com.

27 (j) Walgreen Company: Walgreen Company sold replacement contact  
28 lenses to consumers at www.walgreens.com.

1 (k) Standard Optical: Standard Optical sold replacement contact lenses  
2 to consumers at [www.standardoptical.net](http://www.standardoptical.net).

3 (l) Web Eye Care: Web Eye Care, Inc. sold replacement contact  
4 lenses to consumers at [www.webeyecare.com](http://www.webeyecare.com).

5 (m) Memorial Eye: Memorial Eye P.A. sold replacement contact lenses  
6 to consumers at [www.shipmycontacts.com](http://www.shipmycontacts.com), [www.ship-my-contacts.com](http://www.ship-my-contacts.com) and  
7 [www.iwantcontacts.com](http://www.iwantcontacts.com).

8 **1-800 Contacts' Lawsuit Against Lens.Com**  
9 **Is Dismissed for Lack of Merit**

10 60. 1-800 Contacts also sent cease-and-desist letters and ultimately filed a  
11 lawsuit against its rival, Lens.com. As it had with many of its other rivals, 1-800  
12 Contacts sought an order preventing Lens.com ““from using any variation of the 1-800  
13 CONTACTS Marks and any other marks or names that are confusingly similar,””  
14 including ““sponsored advertising triggers, other identifiers, keywords or other terms  
15 used to attract or divert traffic on the Internet or to secure higher placement within the  
16 search engine results.”” Also, as it had with its other rivals, 1-800 Contacts based its  
17 lawsuit on the incorrect presumption that Lens.com had purchased “1-800 Contacts”  
18 as a keyword from search engines. However, Lens.com fought the lawsuit.

19 61. On December 14, 2010, the district court dismissed 1-800 Contacts’  
20 lawsuit. In a published 40-page decision, the court found that “[1-800 Contacts] has  
21 presented no evidence to show that [Lens.com] ever purchased [1-800 Contacts’]  
22 exact service mark as a keyword.” *1-800 Contacts, Inc.*, 755 F. Supp. at 1160. More  
23 importantly, the court took aim at 1-800 Contacts’ practice of seeking agreements,  
24 through cease-and-desist letters, that precluded a competitor’s advertisements from  
25 appearing on a search-results page anytime its mark is entered as a search term. It  
26 said that such a result would be “an anti-competitive, monopolistic protection to  
27 which it is not entitled”:

28 As stated above, Plaintiff [1-800 Contacts] sends cease and desist  
letters anytime a competitor’s advertisement appears when Plaintiff’s

1 mark is entered as a search term. Were Plaintiff actually able to preclude  
2 competitor advertisements from appearing on a search-results page  
anytime its mark is entered as a search term, it would result in an anti-  
3 competitive, monopolistic protection, to which it is not entitled.

4 *Id.* at 1174.

5 62. The district court's skepticism about such agreements continued, as it  
6 questioned whether any such contract between 1-800 Contacts and Lens.com would  
7 survive an antitrust challenge. According to the order:

8 Were this actually an agreement entered into by the parties, the  
9 court questions whether it would survive an antitrust challenge. [1-800  
10 Contacts] does not seek merely to preclude usage of its trademark.  
11 Instead, it wants to obliterate any other competitor advertisement from  
12 appearing on a search-results page when a consumer types in  
"1800Contacts" as a *search term* or some variation of it. This is  
disturbing given that broad matching of the generic term "contacts"  
could trigger an advertisement if a consumer enters the search term  
"1800Contacts." A trademark right does not grant its owner the right to  
stamp out every competitor advertisement.

13 *Id.* at 1188 (emphasis in original).

14 63. On July 16, 2013, the Tenth Circuit affirmed the district court's summary  
15 judgment on all of 1-800 Contacts' claims based on keyword use that did not result in  
16 ads displaying 1-800 Contacts' mark in their text.

#### 17 **ANTICOMPETITIVE EFFECTS OF THE AGREEMENTS**

18 64. Defendants' conduct harmed plaintiffs and the Class and California  
19 Subclass by depriving them of a marketplace in which consumers of contact lenses  
20 make their decisions about the purchase of contact lenses free from the influence of  
21 defendants' bilateral agreements, which restrain truthful advertising by competitors  
22 responsible for the vast majority of direct-to-consumer sales of contact lenses.

23 65. Defendants' price-fixing conspiracy had the following anticompetitive  
24 effects, among others: (a) price competition has been restrained or eliminated with  
25 respect to contacts lenses sold directly to consumers, including online, in the United  
26 States and California; (b) the price of contact lenses sold directly to consumers,  
27 including online, in the United States and California has been fixed, raised,  
28 maintained, or stabilized at artificially inflated levels; and (c) purchasers of contact



1 lenses sold directly to consumers, including online, in the United States and California  
2 have been deprived of free and open competition. During the Class Period, plaintiffs  
3 and the members of the Class and the California Subclass paid supracompetitive  
4 prices for contact lenses sold directly to consumers, including online, in the United  
5 States and California.

6       66. Plaintiffs have suffered significant injury as a result of defendants'  
7 contact lens price manipulation conspiracy. Typically, when consumers conduct web  
8 searches for contact lenses, they are presented with options from a range of contact  
9 lens sellers. Any sellers who were offering the same contact lenses at prices higher  
10 than their competitors would either (i) retain higher prices and risk losing business to  
11 rivals or (ii) lower prices to bring their prices in line with their competitors' prices and  
12 compete for the business. Falling prices would, in turn, stimulate additional  
13 competition among various contact lens sellers. However, through agreements that  
14 rigged search results in response to online user queries, defendants ensured that  
15 consumers were presented with only one option – the option to pay whatever  
16 defendants wanted to charge in a competition-free market – as long as it was not  
17 enough to drive them to run another search. But for defendants' anticompetitive  
18 conduct, consumers such as plaintiffs would have been aware of and presented with  
19 options from various sellers of contact lenses, and would have purchase lenses from  
20 the seller featuring the lowest price.

21       67. By reason of the alleged violations of federal and California laws,  
22 plaintiffs and the members of the Class and California Subclass have sustained injury  
23 to their business or property in the form of the overcharges they paid for contact  
24 lenses sold directly to consumers, including online, in the United States and  
25 California. Plaintiffs and the Class paid more for contact lenses than they would have  
26 in the absence of defendants' illegal contract, combination, or conspiracy, and, as a  
27 result, have suffered damages in an amount presently undetermined. This is an  
28 antitrust injury of the type that the antitrust laws were meant to punish and prevent.



1       68. In formulating and effectuating the contract, combination or conspiracy,  
2 defendants and their co-conspirators engaged in anticompetitive activities, the purpose  
3 and effect of which was to fix, maintain, suppress, inflate and otherwise make  
4 artificial the price of contact lenses sold directly to consumers, including online, in the  
5 United States and to California residents.

6       69. Plaintiffs suffered antitrust injury in that they paid more for contact  
7 lenses purchased from defendants than they would have paid had the manipulation not  
8 occurred.

9       70. Injury to plaintiffs and the Class and the California Subclass also resulted  
10 from defendants' deprivation of the benefits of free and open competition in the  
11 market for online contact lens sales.

#### 12                                   **CLASS ALLEGATIONS**

13       71. Plaintiffs bring this action as a class action pursuant to Rules 23(a), (b)(2)  
14 and (b)(3) of the Federal Rules of Civil Procedure on behalf of all Class members,  
15 defined as: All persons that made at least one retail purchase of contact lenses from  
16 defendants from January 1, 2004 through the present ("Class Period"). Excluded from  
17 the Class are defendants, their parent companies, subsidiaries and affiliates, any co-  
18 conspirators, governmental entities and instrumentalities of government, states and  
19 their subdivisions, agencies and instrumentalities.

20       72. Plaintiffs also bring this action on behalf of the California Subclass,  
21 which is defined as: all members of the Class that reside in California that made at  
22 least one retail purchase of contact lenses from defendants from January 1, 2004  
23 through the present.

24       73. The Class and California Subclass are ascertainable and are ones for  
25 which records should readily exist.

26       74. Members of each class are so numerous that joinder is impracticable.  
27 Plaintiffs do not know the exact size of the Class and Subclass, but because of the  
28 nature of the trade and commerce involved, plaintiffs believe that there are tens, if not

1 hundreds, of thousands of Class members as described above, the exact number and  
2 identities being known to defendants and their co-conspirators. Moreover, the  
3 members of the Class are dispersed across the United States.

4 75. There is a well-defined community of interest among plaintiffs and the  
5 members of the Class and California Subclass. Because defendants have acted in a  
6 manner generally applicable to the Class and California Subclass, questions of law  
7 and fact common to members of the Class and California Subclass predominate over  
8 questions, if any, that may affect only individual members of the Class and California  
9 Subclass. Such generally applicable conduct is inherent in defendants' wrongful and  
10 anticompetitive conduct.

11 76. Among the questions of law and fact common to the Class are:

12 (a) whether defendants and their co-conspirators entered into an  
13 agreement, combination or conspiracy to rig the bidding in search engine advertising  
14 auctions, increase or maintain supracompetitive prices for contact lenses, allocate the  
15 market for online contact lens sales, and/or prevent the dissemination of information  
16 concerning competitors' pricing of contact lenses;

17 (b) the identity of the participants of the alleged conspiracy;

18 (c) the duration of the conspiracy alleged herein and the acts  
19 performed by defendants and their co-conspirators in furtherance of the conspiracy;

20 (d) whether, pursuant to bidding agreements, defendants agreed to  
21 restrict bidding in search advertising auctions;

22 (e) whether the bidding agreements were necessary to yield a  
23 procompetitive benefit that is cognizable and non-pretextual;

24 (f) whether such agreements are *per se* unlawful because they restrict  
25 competition;

26 (g) whether such agreements are unlawful under the rule of reason;

27 (h) whether 1-800 Contacts possessed market power or monopoly  
28 power over direct-to-consumer and online sales of contact lenses;

1 (i) whether the law requires definition of a relevant market when  
2 direct proof of market power or monopoly power is available and, if so, the definition  
3 of the relevant market(s);

4 (j) whether defendants' conduct affected interstate and intrastate  
5 commerce;

6 (k) whether the conduct of defendants and their co-conspirators, as  
7 alleged in this complaint, caused injury to plaintiffs and the other members of the  
8 Class;

9 (l) whether the effects of defendants' alleged conspiracy were  
10 anticompetitive in nature; and

11 (m) the appropriate nature of class-wide injunctive or other equitable  
12 relief.

13 77. Among the questions of law and fact common to the California Subclass  
14 are:

15 (a) whether the alleged conspiracy violated the Cartwright Act;

16 (b) whether the alleged conspiracy violated the UCL;

17 (c) whether the conduct of defendants and their co-conspirators, as  
18 alleged in this complaint, caused injury to the plaintiffs and the other members of the  
19 California Subclass;

20 (d) the effect of defendants' alleged conspiracy on the prices of  
21 contact lenses sold directly to consumers, including online, to California residents  
22 during the Class Period;

23 (e) the appropriate class-wide measure of damages; and

24 (f) the appropriate nature of class-wide injunctive or other equitable  
25 relief.

26 78. There are no defenses of a unique nature that may be asserted against  
27 plaintiffs individually, as distinguished from the other members of the Class, and the  
28 relief sought is common to the Class.

1           79. There are no defenses of a unique nature that may be asserted against  
2 plaintiffs individually, as distinguished from the other members of the California  
3 Subclass, and the relief sought is common to the California Subclass.

4           80. Plaintiffs are members of the Class and their claims are typical of the  
5 claims of the other members of the Class. Plaintiffs were damaged by the same  
6 wrongful conduct of defendants.

7           81. Plaintiffs are members of the California Subclass and their claims are  
8 typical of the claims of the other members of the California Subclass. Plaintiffs were  
9 damaged by the same wrongful conduct of defendants.

10           82. Plaintiffs will fairly and adequately protect the interests of other Class  
11 and California Subclass members because they have no interests antagonistic to, or  
12 that conflict with, those of any other Class or California Subclass member. Plaintiffs  
13 are committed to the vigorous prosecution of this action and have retained competent  
14 counsel, experienced in litigation of this nature, to represent them and the other  
15 members of the Class and California Subclass.

16           83. A class action is the superior method for the fair and efficient  
17 adjudication of this controversy. Class treatment will enable a large number of  
18 similarly situated parties to prosecute their claims in a single forum simultaneously,  
19 efficiently, and without the unnecessary duplication of evidence, effort and expense  
20 that would result if individual actions were pursued.

21           84. This case is also manageable as a class action. Plaintiffs know of no  
22 difficulty to be encountered in the prosecution of this action that would preclude its  
23 maintenance as a class action. In any event, the benefits of proceeding as a class  
24 action, including providing injured persons or entities with a method for obtaining  
25 redress for claims that could not practicably be pursued individually, substantially  
26 outweigh potential difficulties in the management of this action as a class action.

27  
28

1        85. Defendants' unlawful acts alleged in this complaint had a substantial  
2 effect on commerce and caused antitrust injury to plaintiffs and the Class and the  
3 California Subclass.

4        86. Defendants' unlawful acts had the purpose and effect of manipulating the  
5 price of contact lenses sold directly to consumers, including over the internet, in the  
6 United States and to California residents.

7        87. As a direct result of defendants' violations, plaintiffs and the members of  
8 the Class and California Subclass have been damaged.

9        88. As a direct and foreseeable result of defendants' unlawful anticompetitive  
10 acts, the prices of contact lenses sold directly to consumers, including online, in the  
11 United States and to California residents was manipulated and inflated.

12        89. In addition, as a direct and foreseeable result of defendants' unlawful  
13 anticompetitive acts, plaintiffs, the Class and the California Subclass were deprived of  
14 the ability to receive truthful and non-misleading advertising.

15                    **INTERSTATE AND INTRASTATE COMMERCE**

16        90. At all relevant times, 1-800 Contacts and its co-conspirators promoted,  
17 distributed and sold substantial amounts of contact lenses in a continuous and  
18 uninterrupted flow of commerce across state and national lines throughout the United  
19 States.

20        91. Defendants transmitted and received funds, as well as contracts, invoices  
21 and other forms of business communications and transactions, in a continuous and  
22 uninterrupted flow of commerce across state and national lines throughout the United  
23 States.

24        92. In furtherance of their efforts to monopolize and restrain competition,  
25 defendants employed the United States mails and interstate telephone lines, as well as  
26 interstate travel. Defendants' activities were within the flow of, and have substantially  
27 affected (and will continue to substantially affect), interstate commerce.

28

1        93. Defendants' anticompetitive conduct also had substantial intrastate  
2 effects in that price competition in California has been restrained or eliminated with  
3 respect to contact lenses sold directly to consumers and online, the price of contact  
4 lenses sold directly to consumers and online in California has been fixed, raised,  
5 maintained or stabilized at artificially inflated levels, and purchasers of contact lenses  
6 sold directly to consumers and online in California have been deprived of free and  
7 open competition. The agreements to restrict bidding in search advertising auctions  
8 for the online sale of contact lenses directly impacted and disrupted commerce within  
9 California.

10        94. During the Class Period, contact lenses sold by defendants were shipped  
11 into California and were sold to or paid for by plaintiffs and Class members in  
12 California.

13                    **PLAINTIFFS' CLAIMS ARE TIMELY**

14        95. Plaintiffs bring their claims within the applicable statute of limitations.

15        96. Defendants concealed their anti-competitive activities by, among other  
16 things, engaging in secret communications in furtherance of the conspiracy.  
17 Defendants agreed among themselves not to discuss publicly or otherwise reveal the  
18 nature and substance of their agreements alleged herein.

19        97. None of the facts or information available to plaintiffs, if investigated  
20 with reasonable diligence, could or would have led to the discovery of the conduct  
21 alleged in this complaint. Plaintiffs and the Class were led to believe that the prices  
22 offered to them were the product of legitimate market conditions rather than  
23 defendants' manipulative collusive activities.

24        98. As a result, plaintiffs were prevented from learning of the facts needed to  
25 commence suit against defendants until no earlier than August 8, 2016, when the FTC  
26 filed a complaint against 1-800 Contacts. There are many other reasons why these  
27 facts could not have been known, including that: (i) defendants' advertising strategies  
28 are not public information; (ii) search engines do not publish information concerning

1 particular search terms and search algorithms; and (iii) the horizontal agreements  
2 restricting trade were not disclosed publicly.

3 99. Because of defendants' active steps, including the fraudulent  
4 concealment of their conspiracy to prevent plaintiffs from discovering and suing them  
5 for the anti-competitive activities alleged in this complaint, defendants are equitably  
6 estopped from asserting that any otherwise applicable limitations period has run, or  
7 that the statute of limitations began running before August 8, 2016.

### 8 **MONOPOLY POWER**

9 100. At all relevant times, 1-800 Contacts had market power because it had the  
10 power to maintain the price of contact lenses sold directly to consumers and online  
11 without losing so many sales as to make the supracompetitive price unprofitable.  
12 Indeed, to this day, 1-800 Contacts' prices for contact lenses are consistently up to  
13 40% higher than the prices charged by others in the direct-to-consumer and online  
14 markets.

15 101. At all relevant times, 1-800 Contacts operated in the relevant markets. 1-  
16 800 Contacts sold contact lenses directly to consumers and online at prices well in  
17 excess of its marginal costs and the competitive price for contact lenses, and enjoyed  
18 the resulting high profit margins and correspondence financial benefits – to the  
19 financial detriment of plaintiffs and Class members.

20 102. 1-800 Contacts, at all relevant times, had enjoyed high barriers to entry  
21 with respect to competition in the relevant product market due to regulatory  
22 protections. The FTC has studied the various barriers to entry in the contact lens  
23 market. Such barriers to entry include:

24 (a) New entrants must acquire and possess a substantial amount of  
25 inventory of contact lenses from various manufacturers to attract consumers and meet  
26 their needs with prompt delivery.

27 (b) Before entering the market, new entrants must invest an enormous  
28 amount of money and other resources into their businesses. For example, new



1 entrants must recruit, hire and train personnel and lease or buy real estate. New  
2 entrants must invest in the significant information and systems infrastructure  
3 necessary to support online commerce. New entrants must also create and then invest  
4 in the significant promotional activities necessary to attract customers to their online  
5 sales website.

6 (c) New entrants must overcome established, dominant sellers such as  
7 1-800 Contacts, VisionDirect and the Doe Defendants, and established buyer  
8 preferences. As alleged herein, 1-800 Contacts has dominated the market for direct-  
9 to-consumer and online sales of contact lenses for many years.

10 (d) 1-800 Contacts' practices also serve to deter potential new  
11 competitors from entering the direct-to-consumer and online markets for the sale of  
12 contact lenses.

13 (e) New entrants must establish and maintain relationships with  
14 contact lens manufacturers and consumers. New entrants must negotiate and acquire  
15 distribution rights from contact lens manufacturers to sell their products online.  
16 Establishing and maintaining relationships with manufacturers is costly and time-  
17 consuming. New entrants must also attract enough customers to cover their  
18 substantial operating expenses.

19 **1-800 CONTACTS' UNILATERAL ARBITRATION**  
20 **PROVISION IS NOT BINDING AND UNENFORCEABLE**

21 103. 1-800 Contacts' website has a "Terms of Service" page. The terms of  
22 service page claims that "Any dispute relating in any way to your visit to this website  
23 or to products you purchase through us shall be submitted to confidential arbitration in  
24 Salt Lake City, Utah, except that, to the extent you have in any manner violated or  
25 threatened to violate our intellectual property rights, we may seek injunctive or other  
26 appropriate relief in any state or federal court in the state of Utah, and you consent to  
27 exclusive jurisdiction and venue in such courts."  
28

1           104. This paragraph about arbitration, however, is not binding on plaintiffs,  
2 the Class or the California Subclass. Any agreement to arbitrate is not specifically  
3 highlighted. In fact, there are no direct links to the “Terms of Service” page on 1-800  
4 Contacts homepage. The only way to find the Terms of Service page is to click on the  
5 “Common Questions (FAQ)” link on the 1-800 Contacts’ homepage, which itself is in  
6 extremely small print and is likely to be overlooked, as shown in Exhibit A.

7           105. After clicking on the Common Questions link, there is still no immediate  
8 mention of arbitration. Instead, the last link on the Common Questions page, which  
9 has to be scrolled down to see in most browsers, is a link entitled “Terms of Service,”  
10 as shown in Exhibit A.

11           106. After clicking on the Terms of Service link, a consumer can finally  
12 access the Terms of Service page, which contains the mention of arbitration. Even in  
13 the unlikely event that a consumer did find and review the Terms of Service page  
14 before ordering contact lenses through 1-800 Contacts’ website, the arbitration  
15 language is only viewable if a user scrolls down to a section titled “Disputes,” as  
16 shown in Exhibit A.

17           107. In addition, there is no place for a consumer to acknowledge receipt of  
18 the arbitration provision or for a consumer to acknowledge that it understood that it  
19 was governed by the arbitration provision. In fact, there is no requirement that a  
20 1-800 Contacts customer even see the arbitration provision before ordering contacts  
21 through 1-800 Contacts’ website, let alone take action to expressly consent to the  
22 arbitration provision. Accordingly, there was never any meeting of the minds, as  
23 required by law, regarding the arbitration of disputes and any reasonable user of 1-800  
24 Contacts’ website would be surprised by the existence of the arbitration provision.

25           108. 1-800 Contacts retained the full right to unilaterally modify the terms of  
26 the arbitration agreement, as shown by its carve out of intellectual property disputes.

27           109. Accordingly, 1-800 Contacts’ arbitration provision is unconscionable,  
28 contrary to public policy and unenforceable.

**COUNT I**

**For Violations of §§1 and 3 of the Sherman Antitrust Act  
Against All Defendants  
(On Behalf of the Class)**

110. Plaintiffs incorporate by reference the preceding allegations.

111. Defendants, and their co-conspirators, entered into and engaged in a conspiracy in unreasonable restraint of trade in violation of §§1 and 3 of the Sherman Antitrust Act, 15 U.S.C. §§1 and 3. The conspiracy consisted of a continuing agreement, understanding, or concerted action between and among defendants and their co-conspirators in furtherance of which defendants artificially fixed, raised, maintained and/or stabilized the prices for contact lenses sold directly-to-consumers, including online, throughout the United States.

112. Defendants' unlawful conduct was through mutual understandings, combinations or agreements by, between and among 1-800 Contacts, VisionDirect and the other Doe Defendants. Defendants' conspiracy is a *per se* violation of the Sherman Antitrust Act and is, in any event, an unreasonable and unlawful restraint of trade.

113. There is no legitimate business justification for, or procompetitive benefit caused by, defendants' unreasonable restraint of trade. Any ostensible procompetitive benefit was pretextual or could have been achieved by less restrictive means.

114. Defendants' conspiracy, and the resulting impact on the prices of contact lenses, and the information provided to consumers, occurred in and affected interstate commerce and commerce in and between the territories of the United States.

115. As a direct, intended, foreseeable, and proximate result of defendants' conspiracy and overt acts taken in furtherance therefore, plaintiffs and each member of the Class have suffered injury. Plaintiffs' and each Class member's damages are directly attributable to defendants' conduct, which resulted in all Class members paying more for contact lenses than they would have otherwise paid, but for defendants' agreements.

116. Plaintiffs' and the Class's injuries are the type the antitrust laws were designed to prevent and flow from that which makes defendants' conduct unlawful. Plaintiffs and the Class are entitled to treble damages, attorneys' fees, reasonable expenses, and cost of suit for the violations of the Sherman Antitrust Act.

## COUNT II

### **For Violation of §2 of the Sherman Antitrust Act Against 1-800 Contacts (On Behalf of the Class)**

117. Plaintiffs incorporate by reference the preceding allegations.

118. At all relevant times, 1-800 Contacts possessed substantial monopoly and market power with respect to direct-to-consumer and online sales of contact lenses. 1-800 Contacts possessed the power to control prices, and prevent prices from falling, in direct-to-consumer sales of contact lenses, including in online sales.

119. In violation of §2 of the Sherman Antitrust Act, 1-800 Contacts monopolized, attempted to monopolize and conspired or agreed to monopolize the direct-to-consumer and online markets for contact lenses. As previously alleged, beginning in 2004 and continuing thereafter, 1-800 Contacts abused its monopoly power to inflate the price of contact lenses sold directly to consumers, among other ways, by (i) sending a series of cease-and-desist letters that included baseless representations regarding competitors' supposed purchases and uses of 1-800 Contacts' service mark as a keyword for online searches, (ii) seeking agreements that far exceed the scope of 1-800 Contacts' trademark rights, (iii) filing objectively and subjectively baseless litigation against competitors for the purpose of interfering with their ability to compete in the online market for contact lenses, and (iv) entering into anticompetitive agreements with its competitors that prevented direct-to-consumer and online sellers of contact lenses from competing against each other, and with 1-800 Contacts.

120. 1-800 Contacts did not obtain or maintain its monopoly power by reason of a superior product, business acumen or historic accident.

1 121. 1-800 Contacts' scheme harmed competition as detailed above.

2 122. As a direct and proximate result of 1-800 Contacts' illegal and  
3 monopolistic conduct, as alleged herein, plaintiffs and the Class were injured.

4 **COUNT III**

5 **For Violations of the Cartwright Act**  
6 **Against All Defendants**  
7 **(On Behalf of the California Subclass)**

8 123. Plaintiffs incorporate by reference the preceding allegations.

9 124. The acts and practices detailed above violate the Cartwright Act, Cal.  
10 Bus. & Prof. Code §16700, *et seq.*

11 125. It is appropriate to bring this action under the Cartwright Act because  
12 many of the purchasers reside in California and because other overt acts in furtherance  
13 of the conspiracy and overcharges flowing from those acts occurred in California.

14 126. As detailed above, the anticompetitive conduct described herein  
15 constitutes a *per se* violation of California's antitrust laws and is an unreasonable and  
16 unlawful restraint of trade. The anticompetitive effects of defendants' conduct far  
17 outweigh any purported non-pretextual, pro-competitive justification.

18 127. As a proximate result of defendants' unlawful conduct, plaintiffs and the  
19 members of the California Subclass they seek to represent have been injured in their  
20 business or property in violation of the Cartwright Act, Cal. Bus. & Prof. Code  
21 §16700, *et seq.*, by paying supracompetitive prices for contact lenses bought over the  
22 internet during the Class Period. Such overcharges are the type of injury the antitrust  
23 laws were designed to prevent and flow directly from defendants' unlawful conduct.  
24 Plaintiffs and members of the California Subclass are proper entities to bring a case  
25 concerning this conduct.

26 128. Plaintiffs and members of the California Subclass have standing to and  
27 hereby seek monetary relief, including treble damages, together with other relief, as  
28 well as attorneys' fees and costs, as redress for defendants' Cartwright Act violations.

**COUNT IV**

**For Violations of California's Unfair Competition Law  
Against All Defendants  
(On Behalf of the California Subclass)**

129. Plaintiffs incorporate by reference the preceding allegations.

130. Plaintiffs bring this claim under §§17203 and 17204 of the Cal. Bus. & Prof. Code to enjoin, and obtain restitution and disgorgement of all monetary gains that resulted from, acts that violated §17200, *et seq.*, of the Cal. Bus. & Prof. Code, commonly known as the UCL.

131. Plaintiffs and the members of the California Subclass have standing to bring this action under the UCL because they have been harmed and have suffered injury by being forced to pay inflated, supracompetitive prices for contact lenses sold directly to California residents during the Class Period.

132. In formulating and carrying out the alleged agreement, understanding and conspiracy, defendants and their co-conspirators did those things that they combined and conspired to do, including but not limited to, the acts, practices and course of conduct set forth herein, and these acts constitute unfair competition in violation of the UCL.

133. Defendants' conspiracy had the following effects, among others: (i) price competition in the market for contact lenses sold directly to California residents, including online, during the Class Period was restrained, suppressed and/or eliminated; (ii) prices for contact lenses sold to California residents during the Class Period by defendants and their co-conspirators have been fixed, raised, maintained and stabilized at artificially high, non-competitive levels; and (iii) plaintiffs and members of the California Subclass who purchased contact lenses in California during the Class Period directly from defendants have been deprived of the benefits of free and open competition.

134. As a direct and proximate result of defendants' anticompetitive conduct, plaintiffs and members of the California Subclass have been injured in their business

1 or property by paying more for contact lenses sold directly to California residents and  
2 purchased directly from defendants during the Class Period than they would have paid  
3 absent of the conspiracy.

4 135. The anticompetitive behavior, as described above, is unfair,  
5 unconscionable, unlawful and fraudulent, and in any event it is a violation of the  
6 policy or spirit of the UCL.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, plaintiffs pray that the Court:

9 A. Determine that this action may be maintained as a class action pursuant  
10 to Fed. R. Civ. P. 23(a), (b)(2), and (b)(3), and direct that reasonable notice of this  
11 action, as provided by Fed. R. Civ. P. 23(c)(2), be given to the Class and California  
12 Subclass, and declare plaintiffs representative of the Class and California Subclass;

13 B. Enter a judgment awarding plaintiffs and the Class and California  
14 Subclass damages against defendants as a result of defendants' unlawful conduct  
15 alleged in this complaint, plus treble damages and all other available damages,  
16 including any statutory or liquidated damages or otherwise;

17 C. Award to plaintiffs and the Class and California Subclass their costs of  
18 suit, including reasonable attorneys' and experts' fees and expenses;

19 D. Order that defendants, their directors, officers, employees, agents,  
20 successors, members, and all persons in active concert and participation with them be  
21 enjoined and restrained from, in any manner, directly or indirectly, committing any  
22 additional violations of the law as alleged herein; and

23 E. Award any other and further relief as the Court may deem just and  
24 proper.



**DEMAND FOR JURY TRIAL**

Plaintiffs respectfully demand a trial by jury on all issues that can be tried to a jury.

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